Majlis Agama Islam Negeri Pulau Pinang v Abdul Latiff bin Hassan (as executor of the estate of Hj Mohammad bin Hj Abdul Rashid, deceased) & Anor

HIGH COURT (PENANG) — WRIT OF SUMMONS NO 21NCVC-13–06 OF 2014
ABDUL WAHAB JC
30 OCTOBER 2017

Islamic Law — Wakaf and charitable trust — Wakaf — Landowner by deed poll and indenture transferred land to deceased during latter's lifetime to hold same on trust for use for mosque and Muslim burial ground — Penang State Fatwa Committee issued and gazetted fatwa that land was wakaf — Unaware of wakaf status, administrator of deceased's estate sold land to non-Muslim company — Whether all dealings with land by administrator and company were invalid and had to be set aside under the Administration of the Religion of Islam (State of Penang) Enactment 2004 ('the Enactment') — Whether ss 89 and 90 of the Enactment automatically vested all wakaf property in Penang in the Majlis Agama Islam of Penang as sole trustee of such property — Whether High Court had to give effect to both the fatwa ruling and wakaf status of the land as their validity was never challenged in the Shariah Court

Land Law — Wakaf land — Whether party which bought wakaf land without notice of the wakaf status acquired indefeasible title to the property — Non-Muslim company bought wakaf land from administrator of Muslim deceased's estate not knowing previous owner had given land to deceased to hold on trust for use for a mosque and Muslim burial ground — Penang State Fatwa Committee issued and gazetted fatwa declaring land as wakaf — Whether company could claim it was bona fide purchaser for value and acquired indefeasible title under s 340(3) of the National Land Code ('the NLC') — Whether s 4(2)(e) of the NLC excluded application of NLC to wakaf land — Whether automatic vesting of all wakaf land in the Majlis Agama Islam Negeri Pulau Pinang ('the Majlis') as trustee under ss 89 and 90 of the Administration of the Religion of Islam (State of Penang) Enactment 2004 nullified all dealings with the land by third parties — Whether deceased's administrator had no capacity to sell the land to the company — Whether any rights title or interest acquired in the land by the company was obtained by means of a void instrument and therefore was defeasible under s 340(2)(b) of the NLC

Limitation — Land — Recovery of — Deed poll and indenture executed respectively in 1882 and 1905 by Muslim land owner created wakaf over his land

— Whether non-Muslim company which bought the land in 2013 unaware of the deed poll or indenture could rely on limitation under Limitation Act 1953 in suit by Majlis Agama Islam Negeri Pulau Pinang ('the Majlis') to recover the land — Wakaf land in Penang automatically vested in Majlis as trustee under ss 89 and 90 of the Administration of the Religion of Islam (State of Penang) Enactment 2004 — Whether for purposes of limitation time only began running against the Majlis from the time it discovered the wakaf status of the land in April 2014 — Whether suit by the Majlis was not barred by limitation

By a deed poll and indenture, executed in 1882 and 1905 respectively, a person named Hj Driss granted his land ('the land') to one Hj Abdul Rasheed ('the deceased') to hold it on trust for the purpose of using the land for a mosque and a Muslim burial ground. On receiving information about the existence of the deed poll and indenture and carrying out its own investigations into the matter, the Penang State Fatwa Committee ('the committee') issued a *fatwa* decreeing the land as *wakaf*. The committee obtained the consent of the Yang di-Pertuan Agong to the *fatwa* pursuant to s 48 of the Administration of the Religion of Islam (State of Penang) Enactment 2004 ('the Enactment') and published the same in the *gazette*. Section 89 of the Enactment declared the plaintiff to be the sole trustee of all *wakaf* property in the State of Penang notwithstanding any provision to the contrary contained in any instrument or declaration creating, governing or affecting it. Section 90 of the Enactment provided that all *wakaf* property in Penang vested in the plaintiff. The first defendant ('D1'), who had obtained a grant of letters of administration to the deceased's estate (the annexure to the grant described the land as an asset of the deceased), had the land transferred to his name qua administrator and, after obtaining the court's sanction, sold the land to the second defendant ('D2'), a non-Muslim entity. The plaintiff contended that the sale contravened Islamic law relating to *wakaf* and filed the instant suit to set aside all dealings with the land by D1, D2 or any other party on the ground the land was vested with the plaintiff under the Enactment. The plaintiff sought an order to be registered as the owner of the land and to have D2's name in the document of title deleted. Before the trial of the instant action, D1 had unsuccessfully applied (before a different High Court judge) to strike out the plaintiff's suit under O 18 r 19 of the Rules of Court 2012 on the ground the court had no jurisdiction to entertain the suit as it concerned matters of Islamic law, namely the *fatwa* and *wakaf*, which were solely within the jurisdiction of the Shariah Court. D1 had also contended that the suit was time-barred under ss 6 and 9 of the Limitation Act 1953 and that the indefeasible titles acquired by the defendants to the land under s 340 of the National Land Code ('the NLC') could not be questioned. D1 filed an appeal against the dismissal of the striking-out application but withdrew it afterwards. At the instant trial, D1 again raised the issues of jurisdiction, limitation and indefeasibility of title and challenged not only the *wakaf* status of the land but also the validity of the committee's *fatwa* and whether the court was bound by it.

Held, allowing the plaintiff's claim (without damages), dismissing D1's counterclaim, declaring that the land was vested in the plaintiff and that all dealings with the land by D1 and D2 were invalid and had to be set aside and ordering that the plaintiff be registered as proprietor of the land in place of D2:

(1) The issue of the court's lack of jurisdiction which D1 sought to litigate was already litigated and decided upon in the striking-out application. The judicial commissioner ('JC') had made specific findings during the interlocutory proceedings and the findings were not made in passing or incidentally. It did not matter whether JC's order was final or interlocutory; it was nevertheless binding on the court and all parties and the issue could not be reopened. The defendants were estopped from raising a second time issues that were already determined. Until and unless the finding had been appealed against, the findings of the court via a judgment remained 'the truth' between the parties. In any event, as D2 did not fall within the definition of 'Muslim' and as the issue to be decided involved a Muslim and a non-Muslim, the jurisdiction to do so did not fall to the Shariah court but to the civil courts. There was no issue of this court trespassing into the civil jurisdiction of the Shariah Court on *wakaf* matters because the *fatwa* as *gazetted* had already ruled that the land was *wakaf* and that ruling remained valid and unchallenged (see paras 28–29, 32 & 34).

(2) The defendants failed to satisfy the court on balance of probabilities that the deed poll and indenture were not genuine documents. The plaintiff, on the other hand, had successfully proved that the said documents were validly made and executed by the late Hj Driss. This court was not the proper forum to debate either the validity of the *wakaf* or the validity of the *fatwa*. If D1 was dissatisfied, he should have challenged those matters before the Shariah Court. By not doing so, the *fatwa* stating that the land was *wakaf* remained valid. From the express reading of s 49 of the Enactment, the *fatwa* was binding and enforceable against D1 as a Muslim. There was no reason for this court to depart from the *fatwa* ruling that the land was *wakaf* (see paras 50–51, 57, 62 & 64).

(3) The plaintiff's action was not barred by limitation but was in fact filed within time. On balance of probabilities and in the absence of any evidence to show that the plaintiff knew of the *wakaf* status of the land prior to 2014, and in view of ss 89 and 90 of the Enactment, the plaintiff's cause of action for the purpose of calculating limitation began from the date it discovered the *wakaf* status of the land ie in April 2014. Upon discovery of the *wakaf* status of the land, the plaintiff had promptly entered a caveat filed this action within 2 1/2 months of the discovery to assert its right to the land (see para 70).

(4) The plaintiff failed to satisfy the court on balance of probabilities its allegation of fraud against the defendants. There was no evidence to show

the defendants had actual knowledge of the existence of the deed poll and the indenture, both of which were created in 1882 and 1905 respectively, to which D1 was not party or privy. It was not incumbent upon the defendants to find out what was not reasonable for them to find out (see para 76).

(5) Section 4(2)(e) of the National Land Code ('the NLC') explicitly provided that the NLC did not extend to *wakaf* land. The defendants could not therefore rely on s 340 of the NLC and/or the National Land Code (Penang and Malacca Titles) Act 1963 with regard to the *wakaf* land. By the operation of ss 89 and 90 of the Enactment, the land automatically vested in the plaintiff. As such, any order that granted title of the land to any other party other than the plaintiff was invalid, null and void and had to be set aside. Notwithstanding the applicability of s 4(2)(e) of the NLC in the instant case, the question of whether or not D2 was a bona fide purchaser for value was of no significance as D1 did not have the legal capacity to sell the land to D2. Any rights or interest acquired by D2 with regard to the land was obtained by means of a void instrument and was defeasible under s 340(2)(b) of the NLC. The proviso to s 340(3) of the NLC was not available to the defendants (see paras 80 & 83–84).

[Bahasa Malaysia summary

Mengikut surat ikatan dan indentur, yang dilaksanakan pada tahun 1882 dan 1905, seseorang yang bernama Hj Driss telah memberikan tanahnya ('tanah tersebut') kepada seorang Hj Abdul Rasheed ('si mati') agar dipegang atas amanah bagi tujuan digunakan tanah tersebut untuk masjid dan tanah perkuburan Islam. Apabila menerima maklumat mengenai kewujudan tentang suat ikatan dan indentur itu dan menjalankan siasatannya sendiri berhubung perkara itu, Jawatankuasa Fatwa Negeri Pulau Pinang ('Jawatankuasa tersebut') telah mengeluarkan fatwa dengan membuat keputusan tanah itu sebagai wakaf. Jawatankuasa tersebut telah memperoleh persetujuan Yang di-Pertuan Agong berhubung fatwa itu menurut s 48 Enakmen Agama Islam (Negeri Pualu Pinang 2004 ('Enakmen tersebut') dan telah menerbitkan yang sama dalam *warta*. Seksyen 89 Enakmen tersebut mengisytiharkan plaintif sebagai pemegang amanah tunggal untuk semua hartanah wakaf di negeri Pulau Pinang walau apa pun mana-mana peruntukan yang bertentangan terkandung dalam apa-apa instrumen atau deklarasi yang membuat, mengawal atau menjejaskannya. Seksyen 90 Enakmen tersebut memperuntukkan bahawa semua hartanah wakaf di Pulau Pinang terletakhak pada plaintif. Defendan pertama ('D1'), yang telah memperoleh pemberian surat pentadbiran keada harta pusaka si mati (lampiran kepada pemberian itu menggambarkan tanah itu sebagai aset si mati), telah memindah milik tanah tersebut kepada namanya qua pentadbir dan selepas memperoleh sanksi mahkamah, menjual tanah tersebut kepada defendan kedua ('D2'), entiti bukan Islam. Plaintif

menegaskan bahawa jualan itu bertentangan dengan undang-ndang Islam berkaitan wakaf dan memfailkan guaman ini untuk mengetepikan semua urusan dengan tanah tersebut oleh D1, D2 atau mana-mana pihak lain atas alasan tanah tersebut terletak hak dengan plaintif di bawah Enakmen tersebut. Plaintif memohon perintah agar didaftarkan sebagai pemilik tanah tersebut dan agar nama D2 dalam surat ikatan hakmilik dipadamkan. Sebelum perbicaraan tindakan ini, D1 tidak berjaya memohon (di hadapan hakim Mahkamah Tinggi yang lain) untuk membatalkan guaman plaintif di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 atas alasan mahkamah tiada bidang kuasa untuk melayan guaman tersebut kerana ia mengandungi perkara-perkara yang berkaitan undang-undang Islam, iaitu fatwa dan wakaf, yang semata-mata dalam bidang kuasa Mahkamah Syariah. D1 juga menegaskan bahawa guaman tersebut telah luput had masa di bawah ss 6 dan 9 Akta Had Masa 1953 dan bahawa hakmilik tidak dapat disangkal yang diperoleh oleh defendan-defendan ke atas tanah tersebut di bawah s 340 Kanun Tanah Negara ('KTN') tidak boleh dipersoalkan. D1 telah memfailkan rayuan terhadap penolakan permohonan pembatalan itu tetapi kemudian telah menariknya balik. Pada perbicaraan ini, D1 sekali lagi telah menimbulkan isu-isu bidang kuasa, had masa dan hakmilik tidak dapat disangkal dan mencabar bukan sahaja status wakaf tanah tersebut tetapi juga kesahan fatwa jawatankuasa dan sama ada mahkamah terikat olehnya.

Diputuskan, membenarkan tuntutan plaintif (tanpa ganti rugi), menolak tuntutan balas D1, mengisytiharkan bahawa tanah tersebut terletak hak kepada plaintif dan bahawa semua urusan dengan tanah tersebut oleh D1 dan D2 adalah tidak sah dan perlu diketepikan dan memerintahkan agar plaintif didaftarkan sebagai pemilik tunggal tanah tersebut sebagai ganti D2:

(1) Isu mahkamah tidak mempunyai bidang kuasa yang mana D1 memohon untuk membuat litigasi telahpun dilitigasikan dan diputuskan dalam permohonan pembatalan. Pesuruhjaya kehakiman ('PK') telah membuat dapatan spesifik sepanjang prosiding interlokutori dan dapatan itu tidak dibuat secara kebetulan. Ia tidak penting sama ada perintah PK adalah muktamad atau interlokutori; ia adalah walau apa pun mengikat ke atas mahkamah dan semua pihak-pihak dan isu tersebut tidak boleh dibuka semula. Defendan-defendan diestopkan daripada menimbulkan isu-isu tersebut yang telah ditentukan untuk kali kedua. Sehingga dan kecuali dapatan itu telah dirayu, dapatan mahkamah melalui penghakiman kekal 'the truth' antara pihak-pihak. Dalam apa keadaan, oleh kerana D2 tidak terjatuh di bawah definisi 'Muslim' dan oleh kerana isu untuk diputuskan melibatkan seorang Muslim dan seorang bukan Muslim, bidang kuasa untuk berbuat sedemikian tidak terjatuh kepada Mahkamah Syariah tetapi kepada mahkamah sivil. Tiada isu yang mahkamah ini telah menceroboh bidang kuasa sivil Mahkamah Syariah berhubung hal wakaf kerana fatwa sepertimana *diwartakan* telahpun memutuskan bahawa

tanah tersebut adalah wakaf dan bahawa keputusan tersebut kekal sah dan tidak dicabar (lihat perenggan 28–29, 32 & 34). A

(2) Defendan-defendan telah gagal meyakinkan mahkamah atas imbangan kebarangkalian bahawa surat ikatan dan indentur itu bukan dokumen-dokumen yang tulen. Plaintif, sebaliknya, telah berjaya membuktikan bahawa dokumen-dokumen tersebut telah sah dibuat dan dilaksanakan oleh Hj Driss. Mahkamah ini bukan forum yang sesuai untuk memperdebatkan sama ada kesahan wakaf atau kesahan fatwa. Jika D1 tidak berpuas hati, dia patut mencabar perkara-perkara tersebut di hadapan Mahkamah Syariah. Dengan tidak berbuat sedemikian, fatwa yang menyatakan bahawa tanah tersebut adalah wakaf masih kekal. Berdasarkan pembacaan nyata s 49 Enakmen tersebut, fatwa adalah mengikat dan boleh dikuatkuasakan terhadap D1 sebagai seorang Muslim. Tiada sebab untuk mahkamah ini tidak mengikut keputusan fatwa itu bahawa tanah tersebut adalah wakaf (lihat perenggan 50–51, 57, 62 & 64). B C D

(3) Tindakan plaintif tidak dihalang oleh had masa tetapi sebenarnya telah difailkan dalam masa. Atas imbangan kebarangkalian dan dengan ketiadaan apa-apa keterangan untuk menunjukkan bahawa plaintif mengetahui tentang status wakaf tanah tersebut sebelum 2014, dan berdasarkan ss 89 dan 90 Enakment tersebut, kausa tindakan plaintif bagi tujuan mengira had masa bermula dari tarikh ia mengetahui tentang status wakaf tanah tersebut, iaitu pada April 2014. Setelah mengetahui status wakaf tanah tersebut, plaintif dengan segera telah memasuki kaveat untuk memfailkan tindakan ini dalam tempoh 2 1/2 bulan daripada penemuan itu untuk menegaskan haknya ke atas tanah tersebut (lihat perenggan 70). E F

(4) Plaintif telah gagal memuaskan mahkamah atas imbangan kebarangkalian berhubung pengataannya tentang fraud terhadap defendan-defendan. Tiada keterangan menunjukkan defendan-defendan mempunyai pengetahuan sebenar tentang kewujudan surat ikatan dan indentur itu, kedua-duanya yang telah dibuat pada 1882 dan 1905 masing-masingnya, yang mana D1 bukan pihak atau privi. Ia tidak wajib ke atas defendan-defendan untuk mengetahui apa yang bukan munasabah untuk mereka mengetahui (lihat perenggan 76). G H

(5) Seksyen 4(2)(e) Kanun Tanah Negara ('KTN') secara terang memperuntukkan bahawa KTN tidak dilanjutkan kepada tanah wakaf. Defendan-defendan dengan itu tidak boleh bergantung kepada s 340 KTN dan/atau Akta Kanun Tanah Negara (Hak Milik Pulau Pinang dan Melaka) 1963 berkenaan tanah wakaf. Melalui operasi ss 89 dan 90 Enakmen tersebut, tanah tersebut automatik terletak hak kepada plaintif. Oleh itu, mana-mana perintah yang memberikan hakmilik tanah I

tersebut kepada mana-mana pihak lain selain daripada plaintif adalah menyalahi undang-undang, terbatal dan tidak sah dan perlu diketepikan. Walau apa pun pemakaian s 4(2)(e) KTN dalam kes ini, persoalan sama ada atau tidak D2 adalah pembeli bona fide untuk nilai adalah tidak penting kerana D1 tidak mempunyai kapasiti sah untuk menjual tanah tersebut kepada D2. Apa-apa hak atau kepentingan yang diperoleh oleh D2 berkaitan tanah tersebut telah diperoleh melalui instrumen secara tidak sah dan boleh disangkal di bawah s 340(2)(b) KTN. Proviso kepada s 340(3) KTN tidak sedia ada kepada defendan-defendan (lihat perenggan 80 & 83–84).]

Notes

For a case on wakaf land in general, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) para 5980.

For cases on recovery of land, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2568–2580.

For cases on wakaf, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 919–926.

Cases referred to

A Child & Ors v Jabatan Pendaftaran Negara & Ors [2017] 4 MLJ 440; [2017] 7 CLJ 533, CA (folld)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Carl-Zeiss-Stiftung v Rayner and Keeler Ltd and Others (No 2) [1966] 2 All ER 536, HL (refd)

EON Bank Bhd v Hotel Flamingo and another case [2005] 1 MLJ 712, HC (refd)

Hadmor Productions Ltd and others v Hamilton and another [1983] 1 AC 191, HL (refd)

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57, CA (refd)

International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86; [1980] 1 LNS 31, FC (refd)

Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor [2007] 5 MLJ 101, FC (refd)

Majlis Agama Pulau Pinang & Seberang Perai v Katijah Yoan & Ors [2009] MLJU 1868; [2010] 4 CLJ 592, HC (refd)

Mohamed Habibullah bin Mahmood v Faridah bt Dato Talib [1992] 2 MLJ 793; [1993] 1 CLJ 264, SC (distd)

Muniandy & Anor v Muhammad Abdul Kader & Ors [1989] 2 MLJ 416; [1989] 1 CLJ Rep 116, SC (refd)

Pathmanathan a/l Krishnan (also known as Muhammad Riduan bin Abdullah) v Indira Gandhi a/p Mutho and other appeals [2016] 4 MLJ 455; [2016] 1 CLJ 911, CA (refd)

Persatuan Anak-anak Yatim Malaysia v Jawatankuasa Fatwa Negeri Selangor, Majlis Agama Islam Negeri Selangor & Anor [2013] MLJU 1631; [2013] 1 LNS 757, HC (distd)
Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1, FC (refd)
Seberang Baru Sdn Bhd v Majlis Ugama Islam Pulau Pinang dan Seberang Perai [2011] MLJU 1553; [2011] 1 LNS 1768, CA (folld)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)
Small Medium Enterprise Development Bank Malaysia Bhd v Blackrock Corp Sdn Bhd & Ors [2017] 6 MLJ 116; [2017] 1 LNS 397, CA (refd)
Sumbang Projeks Sdn Bhd v Tenaga Nasional Berhad [2014] MLJU 1813; [2014] 4 CLJ 323, CA (refd)
Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1, FC (refd)
Tengku Zainul Akmal bin Tengku Besar Mahmud & Anor v Majlis Agama Islam dan Adat Melayu Terengganu & Anor [2012] 3 SHLR 39; [2012] 1 CLJ SYA 78, HC (refd)
Yeohata Machineries Sdn Bhd & Anor v Coil Master Sdn Bhd & Ors [2015] MLJU 545, CA (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152; [1990] 1 CLJ Rep 330, SC (refd)

Legislation referred to

Administration of the Religion of Islam (State of Penang) Enactment 2004 ss 48, 47, 49, 53, 61, 74, 89, 90
Evidence Act 1950 ss 101, 102, 103
Federal Constitution art 121(1A)
Limitation Act 1953 ss 6, 9, 29
National Land Code ss 4(2), (2)(e), 340, 340(1), (2)(b), (3), (3)(b)
National Land Code (Penang and Malacca Titles) Act 1963
Rules of Court 2012 O 18 rr 8, 19

Aslam (Sharifah with him) (Presgrave & Matthews) for the plaintiff.
Fahda Nur (Ariffin Haron with her) (Fahda Nur & Yusmadi) for the first defendant.
Abdul Fareed (Noramira with him) (VM Mohan Fareed & Co) for the second defendant.

Abdul Wahab JC:

INTRODUCTION

[1] The plaintiff claimed that following a deed poll dated 6 September 1882 ('deed poll') and an indenture dated 5 June 1908 ('indenture') together with the fatwa as *gazetted* on 21 July 2016 ('fatwa') that the land known as Lot No 791, Mukim 11, Grant Mukim No 457, Bayan Lepas, Daerah Barat Daya,

A Pulau Pinang ('land') is a *wakaf* land. As such, the said land being a *wakaf* land shall not be sold, given as a gift, or inherited by any party except in so far as it involves the plaintiff.

B **[2]** A court order dated 10 August 2012 was obtained by the first defendant from the Shariah High Court of Perlis ('*faraid* order') which had listed the distribution of the estate of Hj Mohammad bin Hj Abdul Rasid, the deceased ('the deceased') to 12 nominees including the first defendant.

C **[3]** The first defendant further obtained a grant of letter of administration dated 4 September 2012 from the High Court of Malaya in Penang Petition No 31–261 of 2011 where he was named the administrator of the estate of the deceased and all parts of the land were listed on the list of assets of the deceased.

D **[4]** The first defendant had subsequently entered into a sale and purchase agreement dated 7 March 2013 involving the said land ('sale and purchase agreement') with the second defendant. A power of attorney dated 7 March 2013 was granted by the first defendant to the second defendant involving the affair of the land.

E

[5] Pursuant to an originating summons filed at the High Court of Malaya in Penang Originating Summons No 24NCVC-426–03 of 2013 ('originating summons'), the first defendant had obtained a court order dated 9 April 2013 allowing him to sell and transfer the land to the second defendant.

F

[6] On 12 April 2013, the first defendant had made an application to change the name on title from Hj Mahomed bin Hj Abdul Rasheed to Hj Mohammad bin Hj Abdul Rasid which had been registered as such. And on the same date, a transmission of ownership was conducted as a result of the death of the deceased which was registered on the same date from the name of the deceased to that of the first defendant in accordance with the grant of letter of administration.

G

H **[7]** The second defendant had also entered a private caveat on the land which was registered on 12 April 2013 ('private caveat').

[8] In April 2014, the plaintiff, through Mr Fakhruddin bin Abd Rahman ('SP5') as the head of the plaintiff's Wakaf Division at the time of the matter, was informed by Mr Subash Hassan ('SP2'), a solicitor from Messrs Hassan Subra & Associates, regarding the existence of 26 magistrate's court suits initiated by the first defendant (as the plaintiff in the said suit) to obtain, amongst others, the vacant possession of the premises located on such part of the land.

I

[9] SP2 was the solicitor representing the defendants in the said magistrate court's suits; in preparation to defend the said suits, SP2 discovered the existence of the deed poll and the indenture involving the land which he believes to be a *wakaf* land hence shall not be sold, given as gift or inherited except to the extent that it involves the plaintiff under the 2004 Enactment.

[10] Having received the information, the plaintiff had proceeded to lodge an application by a letter dated 30 April 2014 for the entry of a registrar caveat on the said land. The plaintiff had also conducted searches on the land on 20 May 2014 and 4 June 2014 where the plaintiff had discovered the existence of facts above and in particular the deed poll and the indenture.

[11] Following a Majlis Fatwa Pulau Pinang Meeting No 3/2014 dated 21 May 2014 and 22 May 2014, a letter dated 13 June 2014 was issued by the Jabatan Mufti Pulau Pinang informing the plaintiff that it has been decided among the Fatwa Committee on the *fatwa* that the land is a *wakaf* land based on the deed poll and the indenture and that the subsequent sale of such *wakaf* land is illegal under the Islamic law ('the *fatwa*').

[12] The *fatwa* made by the Penang State Fatwa Committee on the status of the said land as *wakaf* land, having obtained the consent of the Yang di-Pertuan Agong pursuant to s 48 of the Enactment 2004, had since been *gazetted*.

THE PLAINTIFF'S SUBMISSION

[13] It is the plaintiff's submission that pursuant to s 89 of the Administration of the Religion of Islam (State of Penang) Enactment 2004 ('the Enactment') that notwithstanding any provision to the contrary contained in any instrument or declaration creating, governing or affecting it, the plaintiff shall be the sole trustee of all *wakaf* in the State of Penang and s 90 of the Enactment provides that all property subject to the said s 89 shall without any conveyance, assignment or transfer, and, in the case of immovable property, upon registration under the written law relating to land, vest in the plaintiff, for the purpose of the *wakaf*, *nazr am* or trust affecting the property.

[14] Based on the deed poll, the indenture, the *fatwa* and the reading of provisions under ss 89 and 90 of the Enactment, the plaintiff claimed that it has a proprietary right and/or ownership over the whole land which is the *wakaf* land which shall be registered and vested in the name of the plaintiff and that all other names registered on the documents of title of the said land shall be removed.

[15] Pursuant thereto, the plaintiff in this case claims for the following reliefs:

A (a) a declaration and an order that the said land is vested in the plaintiff and the plaintiff's name be registered as the proprietor of the said land;

(b) a declaration and order that the transfer of ownership of the said land registered on 12 April 2013 under Presentation No 0705B2013000423 from the name of the deceased to the first defendant according to the grant of administration is invalid, void and set aside;

B

(c) order dated 9 April 2013 in the proceeding of the originating summons is set aside or cancelled;

C (d) the sale and purchase agreement entered into between the first defendant and the second defendant involving the sale and purchase of the said land be set aside or cancelled;

(e) the power of attorney granted by the first defendant to the second defendant be set aside or cancelled;

D (f) the entry of private caveat dated 12 April 2013 by the second defendant onto the said land be cancelled and removed;

(g) the name of the first defendant (or name of second defendant) to be removed from the document of title of the said land and be replaced with the name of the first plaintiff;

E

(h) any transfer of the said land made between the first defendant and the second defendant (if any) be cancelled and set aside;

(i) any expenses incurred for the purposes specified in paras (vi)–(vii) above shall be paid by the first defendant and the second defendant respectively;

F

(j) an order that the Registrar of Land Title or the land administrator concerned shall make and execute all necessary actions and measures to give full effect to all the orders given herein;

G (k) an order that the first defendant and the second defendant shall pay all damages to be assessed by this court, the interest of such damages at the rate of 5%pa calculated from the filing date of the summons until full settlement;

H (l) the costs incurred or resulting from this action to be borne by the defendants to be paid to the plaintiff; and

(m) such and other reliefs as this court deems fit and proper to grant.

I **[16]** The first defendant applied to strike out the plaintiff's claim under O 18 r 19 of the Rules of Court 2012 ('the RC') on the grounds that the court lacks jurisdiction to hear syariah issues, that the plaintiff's claim is barred by limitation and that he has an indefeasible title to the land by virtue of s 340 of the NLC which was dismissed by Justice Wong Teck Meng JC on 15 July 2015.

The first defendant had filed an appeal against the said decision but had subsequently withdrawn it.

THE DEFENDANTS' SUBMISSION

[17] The first defendant in disputing the plaintiff's claim had submitted as follows:

(a) that the subject matter in the present case in relation to the land known as Lot No 791, Mukim 11, Grant Mukim No 457, Bayan Lepas, Daerah Barat Daya, Pulau Pinang ('land') is in respect of a disputed *wakaf* hence this court has no jurisdiction to determine the matter with regard to Islamic law in respect of the *wakaf* land as well as the *fatwa*;

(b) that the first defendant has an indefeasible title to the said land as provided under s 340(1) of the National Land Code ('the NLC');

(c) that the *fatwa* was doubtful and unclear (*fatwa syubhah*) due to the disorganised decision made by the Majlis Fatwa Pulau Pinang;

(d) that the said *fatwa* is not binding on this court; and

(e) that the plaintiff's claim is barred by limitation as the said *wakaf* was made more than 100 years ago.

[18] It was also submitted by the second sefendant that pursuant to the National Land Code (Penang and Malacca Titles) Act 1963 ('Act 518'), the land had become indefeasible under the NLC from 1 January 1985 with Hj Mahomed bin Hj Abdul Rasheed being the owner absolutely.

FINDINGS OF THIS COURT

[19] In view of the facts of this present case and the issues as raised by the parties, I shall proceed to determine the issues as raised before this court in the following order:

(a) whether or not this court has jurisdiction;

(b) whether or not the the land is a *wakaf* land;

(c) whether or not the *fatwa* is a valid *fatwa* and whether or not this court is bound by the said *fatwa*;

(d) the issue of limitation with regard to the plaintiff's action; and

(e) the issue of indefeasibility of title of the land.

A WHETHER OR NOT THIS COURT HAS JURISDICTION

[20] Before I proceed any further, I believe it is essential to first determine on the question of jurisdiction as raised by the first defendant in order to determine whether or not this court has jurisdiction to hear this matter. The first defendant in his defence relied on art 121(1A) of the Federal Constitution which provides as follows:

> Judicial power of the Federation
>
> (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely —
>
> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and
>
> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;
>
> (c) *(Repealed)*,
>
> and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.
>
> (1A) *The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.* (Emphasis added.)

[21] On this point, the plaintiff submitted that the first defendant's objection is unsustainable on the ground of res judicata as this matter had already been determined by this court and ruling was made by Justice Wong Teck Meng as follows:

> ... in this present case, the ruling that this land is *wakaf* land has been determined by the Majlis Fatwa Pulau Pinang pursuant to s 47 of the 2004 Enactment based on the Deed Poll and Indenture and a *fatwa* to the effect had been issued. The said *fatwa* is an Islamic edict that has to be obeyed by the first defendant who is a Muslim. Hence, with the *fatwa* ruling, this court will be merely implementing the said ruling that the land is *wakaf* land and gives the necessary reliefs that the plaintiff is asking which are within the civil jurisdiction of the High Court, Malaya. There is therefore, no issue of this court trespassing into the civil jurisdiction of the Syariah Court on *wakaf* matters.
>
> In the event that the first defendant is unhappy with the *fatwa* ruling, which is the case here, the first defendant should challenge it in the Shariah High Court and not the other way around that is to force or insist that the plaintiff files a suit and seeks a decision from the Shariah High Court before coming to the High Court here. For the plaintiff, the *fatwa* ruling is in their favour and up to the date this decision was made, the defendant has not gone to the Shariah High Court to challenge the *fatwa*

ruling. If the first defendant is so keen to dispute the said *fatwa* ruling, he should be the first person to seek his remedy there. Hence, there is no issue of jurisdiction here as the subject matter ie *wakaf* land has been determined by the said *fatwa* and what remains in this court is to decide and determine the other substantive issues and reliefs raised and sought for in the plaintiff's amended statement of claim which is within the exclusive jurisdiction of the High Court. See *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1; [1991] 3 CLJ 2768; [1991] 1 CLJ Rep 77 where the Supreme Court remitted the case to the High Court and directed a *fatwa* be obtained. Hence, this court can rely on the said *fatwa* which has determined that the said land is *wakaf* land.

[22] The underlying policy is that litigants should not be vexed twice in the same matter and that the public policy requires a finality in litigation. The doctrine of res judicata was succinctly explained in the case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, where Peh Swee Chin FCJ (as he then was) stated as follows:

What is res judicata? *It simply means a matter adjudged, and its significance lies its effect of creating an estopped per rem judicatum.* When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it's the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation — interest *rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari proeadem causa*. Both maxims are the rationales for the doctrine of res judicata, but the earlier maxim has further elevated status of question of public. (Emphasis added.)

[23] On the doctrine of res judicata, it is important to appreciate that this doctrine has its root in equity and hence retains its discretionary nature that is common to all equitable doctrines (see *Small Medium Enterprise Development Bank Malaysia Bhd v Blackrock Corp Sdn Bhd & Ors* [2017] 6 MLJ 116; [2017] 1 LNS 397). Since the doctrine is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result as may be observed from the case of *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd and Others (No 2)* [1966] 2 All ER 536 as follows:

As my noble and learned friend, Lord Reid, has already pointed out there may be many reasons why a litigant in the earlier litigation has not pressed or may even for good reasons have abandoned a particular issue. It may be most unjust to hold him precluded from raising that issue in subsequent litigation (and see Lord Maugham LC's observations in the *New Brunswick* case [1938] 4 All ER 747 at p 755; [1939] AC 1 at p 21). All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.

[24] Bearing the above authorities in mind, I am of the considered view that the issue of lack of jurisdiction which the first defendant sought to litigate had already been litigated in the application to strike out. In this instant case, the learned judicial commissioner had made specific findings during the interlocutory proceedings and the findings were not made in passing or incidentally. it did not matter whether the order in question was final or interlocutory; it was nevertheless binding on the court and all parties and may not be reopened the same (see *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57). I therefore agree with the plaintiff's counsel that the defendants are estopped from raising a second time issues that had already been determined.

[25] The rule is very simple that until and unless that finding has been appealed against, the findings of the court via a judgment is the truth and remains the truth. The rule does not distinguish between findings made based on affidavit evidence and findings made based on oral evidence. In the absence of any appeal in respect of the decision in the striking out application, the decision of Wong Teck Meng JC remained 'the truth' between the parties. If the defendants were dissatisfied with this decision, the defendants should have proceeded with the appeal against the matter in the Court of Appeal. It is untenable for the defendants to raise the same issues again in the same court in the same case.

[26] Notwithstanding what have been said above, for completeness purpose, I shall nevertheless delve into the question of jurisdiction with regard to the matter brought before me. The first defendant had cited several cases in support of his defence including the case of *Mohamed Habibullah bin Mahmood v Faridah bt Dato Talib* [1992] 2 MLJ 793; [1993] 1 CLJ 264 as follows:

> ... It is obvious from the very beginning that the makers of the Constitution clearly intended that the Muslims of this country shall be governed by the Islamic Family Law as evident from the Ninth Schedule to the Constitution ...
>
> Indeed, that Muslim in this country are governed by Islamic personal and family laws has been in existence with the coming of Islam to this country in the 15th century. Such laws have been administered not only by the Syariah Courts but also by the Civil Courts. What art 121(1A) has done is to grant exclusive jurisdiction to the Syariah Courts in the administration of such Islamic Laws. In other words, art 121(1A) is a provision to prevent conflicting jurisdiction between the Civil Courts and the Syariah Courts.

[27] The jurisdiction of the Syariah Court is clearly provided under s 61 of the Enactment which states that the Syariah High Court in its civil jurisdiction, can hear and decide all actions and proceedings if all the parties in the action or proceeding are Muslims. The law demands that the parties in dispute before the

Shariah High Court are Muslims. Further s 74 of the Enactment also provides that the jurisdiction of Shariah Appeal Court, Shariah High Court or Shariah Subordinate Court does not extend to non-Muslims.

[28] Guided by the above authorities, it is in my considered view that the facts of this case may be distinguished from the case of *Mohd Habibullah* in that the parties involved in this case ie the second defendant does not fall within the definition of a Muslim. It is well settled that if the issue to be decided involves a Muslim and a non-Muslim, the jurisdiction does not fall with the Shariah Court and common-sense dictates that it has to fall under the civil courts (see *Pathmanathan a/l Krishnan (also known as Muhammad Riduan bin Abdullah) v Indira Gandhi a/p Mutho and other appeals* [2016] 4 MLJ 455; [2016] 1 CLJ 911; *Tengku Zainul Akmal bin Tengku Besar Mahmud & Anor v Majlis Agama Islam dan Adat Melayu Terengganu & Anor* [2012] 3 SHLR 39; [2012] 1 CLJ (SYA) 78).

[29] Another case referred to by the first defendant in support of his contention was the Federal Court case of *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101 where it was held as follows:

> [48] There are cases in which some of the issues fall within the jurisdiction of the civil court and there are also issues that fall within the jurisdiction of the syariah court. This problem too will have to be tackled by the Legislature. Neither court can assume jurisdiction over matters that it does not have just because it has jurisdiction over some of the matters arising therein. Neither court should give a final decision in a case only on issues within its jurisdiction.
>
> [49] Until the problem is solved by the Legislature, it appears that the only way out now is, *if in a case in the civil court, an Islamic law issue arises, which is within the jurisdiction of the syariah court, the party raising the issue should file a case in the syariah court solely for the determination of that issue and the decision of the syariah court on that issue should then be applied by the civil court in the determination of the case*. (Emphasis added.)

[30] It is important to note that the plaintiff's claim is that, based on the deed poll and the indenture, the land in dispute is a *wakaf* land. A *fatwa* to that effect had been issued and the plaintiff is therefore entitled to reliefs sought. Of like mind with Justice Wong Teck Meng, it is therefore in my considered view that there is no issue of this court trespassing into the civil jurisdiction of the Shariah Court on *wakaf* matters on the grounds that the *fatwa* as *gazetted* had in fact ruled that the land is a *wakaf* land and the *fatwa* ruling had not been challenged by the first defendant at the Shariah Court and to date the said *fatwa* remains valid. What is left to be determined by this court is whether or not the plaintiff is entitled to the relief sought against the defendants and as the second defendant is not a Muslim within the definition of the Enactment this matter

would fall outside jurisdiction of the Shariah Court with regards to matters involving the second defendant.

BURDEN OF PROOF

[31] Having concluded on the issue of jurisdiction, I shall now proceed to determine the matter brought before me at greater length. I shall begin with the fundamental principle that the burden of proof lay throughout on the plaintiff to prove its claim against the defendants. It is plain that the legal burden to prove on allegation lies on the party making the assertion (see ss 101–103 of the Evidence Act 1950). Until and unless the legal and evidentiary burden of proving its claim is discharged, the burden does not shift to the defendant to prove its defence, no matter how weak the defence might be (per Lim Yee Lan JCA in *Sumbang Projeks Sdn Bhd v Tenaga Nasional Berhad* [2014] MLJU 1813; [2014] 4 CLJ 323).

[32] In *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86; [1980] 1 LNS 31, Salleh Abas FCJ (as he then was), delivering the judgment of the court, said that the first sense of the expression 'burden of proof' in s 101 is the burden to establish the case which rests throughout on the party who asserts the affirmative of the issue, while the second sense of the expression 'burden of proof' in s 102 is the burden to adduce evidence:

> For the purpose of this appeal it is necessary to bear in mind the distinction between the two senses in which the expressions burden of proof and onus of proof are used (*Nanji & Co v Jatashankar Dossa & Ors* AIR 1961 SC 1474–1478 and *Raghavamma v Chenchamma* AIR 1964 SC 136–143). The first sense, signified by the expression burden of proof such as referred to in s 101 of the Evidence Act is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue. The appellants in the present appeal relied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (*Gatley on Libel and Slander* (7th Ed) paras 351 and 354). The second sense referred to as onus of proof, on the other hand, relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to ss 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail. It is this onus that we are concerned with in the present appeal.

[33] The 'burden of proof' in s 101 is the burden to establish a case which rests throughout on the party who asserts the affirmative of the issue. The 'burden of proof' in s 102 is the burden to adduce evidence, to make out or rebut the claim and this burden shifts from one side to the other according to

the weight of the evidence. To differentiate the sense used, the 'burden of proof' in s 101 is 'burden of proof', while the 'burden of proof' in ss 102 and 103 is dubbed 'onus of proof'. In some jurisdictions, the s 101 'burden of proof' is labelled 'legal burden' while the s 102 'burden of proof' is referred to as 'evidential burden' (see *Yeohata Machineries Sdn Bhd & Anor v Coil Master Sdn Bhd & Ors* [2015] MLJU 545).

[34] The fact in issue that must be proven by the plaintiff is that the land is a *wakaf* land and that the said land shall vests in the plaintiff in order for the plaintiff to be entitled to the reliefs sought for in this case. In the event the plaintiff fails to prove these facts on a balance of probabilities, its case must necessarily fail.

WHETHER OR NOT THE LAND IS A *WAKAF* LAND

[35] The plaintiff in supporting its claim that the said land is a *wakaf* land had adduced the following evidence before me:

(a) the deed poll;

(b) the indenture; and

(c) a letter dated 13 June 2014 by Jabatan Mufti Pulau Pinang with regard to the *fatwa*.

[36] The plaintiff further contended that this matter had been determined by this court in the first defendant's striking out application where the court had held that pursuant to s 47 of the Enactment, the Majlis Fatwa Pulau Pinang had decided that the land is a *wakaf* land based on the deed poll and the indenture and a *fatwa* to the effect had been issued. The court went on to state that the said *fatwa* being an islamic edict has to be obeyed by the first defendant who is a Muslim.

[37] The defendants had however, in the present hearing, disputed the deed poll as well as the indenture on the ground that Hj Driss had died in the year 1832 whilst the deed poll and the indenture was executed after the demise of the said Hj Driss and is thereby invalid.

[38] It is the plaintiff's submission that this matter was not pleaded by the defendants in their statement of defence and the defendant is therefore estopped from raising these issues before this court. Furthermore the plaintiff had adduced further evidence in support of its contention that the late Hj Driss had died after the year 1832 as follows:

(a) 'Conveyance dated *6.9.1882* Reg No 547 by Hajee Driss: Grant No 2421 Lot 391 Pt II Mk XI';

(b) 'Conveyance dated *4.4.1854* by EIC to Hajee Driss: Lot 344 Pt I Mk XI';

(c) 'Deed Poll dated *5.2.1855* to Hajee Driss: Lot 48 and Lot 433 Mk XI';

(d) 'Deed Poll dated *13.12.1852* to Hajee Driss [Reg 313]: Lot 391 Mk XI'; and

(e) 'Deed Poll dated *6.9.1882* made by Hajee Driss and wife Saibah to Hajee Abdul Rasheed: Lot 391 Mk XI'.

[39] On the issue of pleadings, emphasis must be given on the trite law that parties are bound by their pleadings as expounded in the Federal Court case of *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1 wherein His Lordship Ramly Ali FCJ (delivering judgment of the Federal Court) stated as follows:

OUR FINDINGS ON THIS ISSUE

[29] *It is a cardinal rule in civil litigation that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded* (see *State Government of Perak v Muniandy* [1986] 1 MLJ 490; and *Anuar bin Mat Amin v Abdullah bin Mohd Zain* [1989] 3 MLJ 313). In *Blay v Pollard & Morris* [1930] 1 KB 628 , Scrutton LJ ruled that: *'Cases must be decided on the issues on the record; and if it is desired to raise other issues there must be pleaded on the record by amendment'*.

[30] The Supreme Court in *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428, had also emphasised the importance of pleadings and ruled that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal (see also *AmBank (M) Bhd (formerly known as Arab-Malaysia Bank Bhd) v LuqmanKamil bin Mohd Don* [2012] 3 MLJ 1 (FC)).

[31] On the same issue, HRH Raja Azlan Shah FJ (as HRH then was) in *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157, had also pointed out that 'as the trial judge had decided on an issue which was not raised in the pleadings, the judgment must be set aside and new trial ordered' (see also *Haji Mohamed Dom v Sakiman* [1956] 1 MLJ 45; and *Kiaw Aik Hang Co Ltd v Tan Tien Choy* [1964] 1 MLJ 99).

[40] It is also required under O 18 r 8 of the RC 2012 for the defendant to plead specifically any matter or any fact showing illegality which makes the claim not maintainable; if not pleaded might take the plaintiff by surprise; or raises a fact not arising out of the claim. Fraud and forgery are but examples of specific pleas.

[41] The decision in the case of *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; [1990] 1 CLJ Rep 330 by the Supreme Court reiterating a four stand already taken in its earlier decision in *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416 at p 417; [1989] 1 CLJ Rep 116 at p 233 on the importance of pleadings where the Supreme Court quoted with approval

the opinion expressed by Lord Diplock in *Hadmor Productions Ltd and others v Hamilton and another* [1983] 1 AC 191 on why such matters needed to be specifically pleaded:

> Under our adversarial system of procedure, for a Judge to disregard the rule by which Counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the Judge, and to be given the opportunity of stating what his answer to it is ...

[42] On the facts of this case, the first defendant had pleaded the issue of genuinity of the deed poll and the indenture. There are some particulars of these matters though not full. Nevertheless, the plaintiff was able to respond to these matters and file a reply. I am therefore of the view that the defendant had pleaded specifically and properly the issue of genuinity of the deed poll and the indenture and had not attempted to raise through evidence or submission an issue, a fact or a defence that departs from the pleaded case.

[43] On this specific plea however as the question with regard to genuinity of the deed poll and the indenture as raised by the first defendant would inadvertently give rise to the issue of illegality of the transaction, the burden of proof therefore lies on the defendant (see *EON Bank Bhd v Hotel Flamingo and another case* [2005] 1 MLJ 712). It is for the defendant to lead evidence to conclusively prove that the said documents were not genuinely made by the late Hj Driss.

[44] However, not a shred of evidence was adduced before me to prove that the late Hj Driss had died in year 1832 and that the said documents were not made by him. Neither parties had called for the assistance of a handwriting expert in clearing up the discrepancies with regard to the disputed date and/or the signature contained in the indenture.

[45] The plaintiff had however adduced evidence to show that the late Hj Driss had entered into several transactions after the year 1832 which would not have been possible had the late Hj Driss met his demise. Should I go along with the defendant's line of argument, that is that the late Hj Driss had died in the year 1832, it would mean that the conveyance of the said land by EIC to Hj Driss dated 4 April 1854 would have been void. But the fact that the land was conveyed to Hj Driss on the said date was never disputed by the defendants. The defendants cannot, in my view, say that the late Hj Driss had died in year 1832 on one hand and on the other hand stand by the validity of the conveyance of the said land.

[46] For the reasons given above, I am more inclined to agree with the plaintiff that it is more probable than not that the late Hj Driss had died after

A the year 1832 and that the date as stated in the indenture with regard to the year of death of the late Hj Driss is in fact in the year 1882, the defendants had failed to satisfy this court on the balance of probabilities that the said documents were not genuine and that the signature contained in the indenture is not that of Hj Driss.

B

[47] From a thorough evaluation of evidence as adduced before me, I am of the considered view that issue of genuinity of the deed poll and the indenture is without merits. The plaintiff had, in my view, successfully proven to the satisfaction of this court that the said deed poll and indenture are documents C validly made and duly executed by the late Hj Driss.

[48] The deed poll and the indenture clearly indicate the intention of Hj Driss and his wife to grant the land onto Hajee Abdul Rasheed to hold the said land in trust for the purposes of a mosque or place of public worship and D burial ground for the Mahomedan Community of the village of Bayan Lepas in Penang forever. Having considered these documents, the State Majlis Fatwa Pulau Pinang had issued a *fatwa* stating that the land is a *wakaf* land.

E **[49]** The defendants however raised issue with regard to the validity of the *wakaf* alleging that the said *wakaf* is invalid on the ground that the said *wakaf* contained was subject to condition contained in the indenture which I hereby reproduced the relevant excerpt as follows:

> F ... shall at all times have the exclusive privilege and authority to nominate & appoint on to and in any other person or persons whomsoever in any use to sell assign transfer convey or otherwise alienate the said price or parcel thereof.
>
> ... hendaklah pada setiap masa mempunyai keistimewaan & autoriti eksklusif untuk mencalonkan & melantik terhadap dan pada mana-mana orang lain barang siapa pun dalam apa jua peranan untuk menjual menyerah hak menukar har G memindah hak atau sebaliknya memberi milik harga atau petak darinya yang tersebut.

[50] From my standpoint, this is not a matter that may be determined by this court as I am bound by art 121(1A) of the FC. As such I shall refer to evidence H and express my views only as a matter of opinion and reserve myself from making any ruling pertaining to matters involving *hukum syarak*. Nevertheless, s 53 of the Enactment does allow for this court to request for the opinion of Fatwa Committee where any question on *hukum syarak* is involved and that the Mufti may certify the said opinion.

I

[51] In the present case, the Mufti was called to testify as a witness for the plaintiff ('SP4') and he was thoroughly cross-examined by the defendant's counsel with regard to the validity of the *wakaf*. It is SP4's evidence in court that where a condition is imposed on a *wakaf* the *wakaf* itself is valid whilst the

condition contained therein is not. SP4 in his evidence stated as follows:

> Dan mengikut dalil kitab Al-Fiqh Al-Manhaji Mazhab Al-Syafie Jilid 3 berkaitan Bab Aqad Wakaf [Terjemahan Bahasa Melayu terbitan Jabatan Kemajuan Islam Malaysia oleh Dr Zulkifle Bin Mohamad al-Bakri iaitu Mufti Negeri Selangor] di bawah topik 'Pengecualian daripada Syarat Jangka Masa', *dinyatakan bahawa walaupun adanya syarat jangka masa ini, ulamak telah mengecualikan masjid, benteng pertahanan, kawasan kubur atau yang seumpama dengannya, seperti membebaskan hamba. Ulamak meletakkan hukum wakaf ini sah selama-lamanya dan jangka masa tersebut dimansuhkan.* Tujuan jangka masa tersebut dimansuhkan adalah untuk menjadikan aqad tersebut sah, selagi ada jalan untuk itu.

[52] The defendant had called one, Asst Prof Dr Ismail bin Mohd @ Abu Hassan ('SD7') to give his expert opinion on the validity of the *wakaf* and SD7 had referred this court to several excerpts of 'kitab' in an attempt to address the issue with regard to the effect of imposition of condition in a *wakaf*. However, none of which referred to by SD7 addressed the issue of conditional *wakaf*, as this case relates, where such *wakaf* is for the purpose of a mosque, or place of public worship and burial ground.

[53] I would like to repeat that this court is not the proper forum to debate on the issue of validity of *wakaf*. As such based on evidence adduced before me, I find support in the deed poll and the indenture that a *wakaf* was intended on the land by the late Hj Driss and his wife albeit conditional, as explained by the Mufti, does not invalidate the *wakaf*.

VALIDITY OF *FATWA*

[54] On the facts, a letter dated 13 June 2014 was issued by Jabatan Mufti Pulau Pinang informing the plaintiff and the first defendant of the decisions made by the Majlis Fatwa Pulau Pinang with regard to the land as follows:

(a) that the land is a *wakaf* land based on the deed poll and the indenture; and

(b) subsequent sale and purchase transaction in respect of the land being a *wakaf* land is therefore invalid under the Islamic law.

[55] The first defendant dispute the *fatwa* on the ground that it was dubious and was classified as a 'Fatwa Syubhah'. On this point, the first defendant had, in my opinion, correctly referred this court to the case of *Persatuan Anak-anak Yatim Malaysia v Jawatankuasa Fatwa Negeri Selangor, Majlis Agama Islam Negeri Selangor & Anor* [2013] MLJU 1631; [2013] 1 LNS 757 concerning *fatwa* issue where it was held that such matter falls within the jurisdiction of the Syariah Court.

[56] Although I agree with the principles as laid down in the above cases, I am however of the view that the defendant's counsel in relying on these cases is misconceived. In this case, as may be contradicted from the facts of the above cases, the plaintiff had not at any instance disputed the validity of the *fatwa*. The plaintiff merely relied on the said *fatwa* supported by the deed poll and the indenture which as I have ruled earlier on to be valid documents in stating that the land is a *wakaf* land entitling the plaintiff to the reliefs sought. On this point, it must be observed in the Court of Appeal case of *A Child & Ors v Jabatan Pendaftaran Negara & Ors* [2017] 4 MLJ 440; [2017] 7 CLJ 533 where it was held as follows:

> ... *the question of the appellants having to go to the Shariah Court for a ruling or for a declaration that the first appellant is a legitimate child does not arise at all for the simple reason that they never disputed that the first appellant is an illegitimate child,* unlike Lina Joy who denied that she was still a Muslim when applying to delete the word 'Islam' from her identity card. The appellants' challenge was on the correctness in law of the second respondent's refusal to replace the surname 'Abdullah' with the second appellant's name in the birth certificate of the first appellant.
>
> [61] *It needs to be emphasised that the appellants' application involved the administration of the civil law by the civil authority and not the administration of the hukum syarak by the religious authority.* The matter before the second respondent was a simple and straightforward question of whether the second appellant, being a person duly and lawfully registered as the father of the first appellant under s 13, was entitled, by virtue of s 13A(2), to register the first appellant's surname in his name. This is a purely administrative function that has nothing to do with Islamic jurisprudence on legitimacy. (Emphasis added.)

[57] Section 49 of the Enactment expressly provides that a *fatwa* upon its publication in the gazette shall be binding on every Muslim in the State of Penang unless he is permitted by Hukum Syarak to depart from the *fatwa*. The said section reads as follows:

> S 49 A fatwa published in the Gazette is binding
>
> (1) Upon its publication in the Gazette, a fatwa shall be binding on every Muslim in the State of Penang as a dictate of his religion and it shall be his religious duty to abide by and uphold the fatwa, unless he is permitted by Hukum Syarak to depart in matters of personal observance.
>
> (2) A fatwa shall be recognised by all courts in the State of Penang of all matters laid down therein.

[58] Applying the above authorities to the facts of the present case, it is in my considered view that the issue of validity of *fatwa* does not fall within the jurisdiction of this court. Should the first defendant feel dissatisfied by the *fatwa* ruling, it is the first defendant, and not the plaintiff, who should have brought this matter before the Shariah Court. As the first defendant had failed to do so, the *fatwa* stating that the said land is a *wakaf* land therefore remains

valid. From the express reading of s 49 of the Enactment, the *fatwa* shall be binding an enforceable against the first defendant as a Muslim.

[59] The defendants in this case had referred to the case of *A Child* in stating that the said *fatwa* is not binding on this court as follows:

> 53. Since the prerequisites and the procedure for the registration of an illegitimate child's surname are spelt out in black and white in s 13A(2), it is this procedure that should guide the second respondent in considering an application under the section and not any *fatwa* that does not have any legislative force and which does not have any binding effect on him. Such *fatwa* cannot be used as a source of legal authority for the purpose of determining a child's surname under s 13A(2).
>
> 54. *Even if the fatwa has legislative force, being made pursuant to a State law (if at all), it cannot prevail over the BDRA, which is a Federal law*. There is no reference whatsoever in the BDRA to any *fatwa* or Islamic law that can be construed as having the effect of diluting or qualifying the legislative force of s 13A(2) in its application to an illegitimate Muslim child.
>
> 65. Such abrogation of power will render s 13A(2) of the BDRA completely otiose and gives the impression that Parliament had enacted the provision in vain, a proposition that has no place in legislative interpretation. A *fatwa* or a religious edict issued by a religious body has no force of law unless the *fatwa* or edict has been made or adopted as federal law by an Act of Parliament. Otherwise a *fatwa* issued by a religious body will form part of federal law without going through the legislative process. (Emphasis added.)

[60] Contrary to the above case, the issue in this case involves that of a *wakaf* land which is strictly governed by the Enactment. The *wakaf* was expressly made by Hj Driss and his wife by way of the deed poll and the indenture, and the *fatwa* was issued to that effect. The *fatwa* having been issued by the Majlis Fatwa Pulau Pinang does not in any way contradict any written law. As I have ruled earlier on, in the absence of any challenge by the first defendant at the Shariah Court with regard to the validity of the *wakaf* and/or *fatwa*, the said *fatwa* remains valid and enforceable against the first defendant as a Muslim. There is no reason whatsoever for this court to depart from the *fatwa* ruling that the land is a *wakaf* land.

ISSUE OF LIMITATION

[61] The first defendant vide his written submission submitted that as the plaintiff's claim to set aside his title to the land is heavily reliant on the deed poll and the indenture which by nature of the claim is for the recovery land. Hence, it is submitted that pursuant to ss 6 and 9 of the Limitation Act 1953, the plaintiff's claim time barred as it was filed in excess of the limitation period.

[62] The plaintiff had however contended that the plaintiff had only discovered the existence of the *wakaf* on the land in the month of April 2014

and upon the said discovery had entered a caveat on the said land. Furthermore, the plaintiff had pleaded fraud, falsification, insufficient or invalid instruments and negligence on the part of the first defendant. Hence, it is the plaintiff's submission that s 29 of the Limitation Act would apply wherein limitation period does not begin to run until the plaintiff had discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

[63] On this point I believe I have made my decision clear in stating that the land, pursuant to the deed poll and the indenture together with the issuance of the *fatwa*, is a *wakaf* land. Section 89 of the Enactment clearly provides that notwithstanding any provision to the contrary contained in any instrument or declaration creating, governing or affecting it the plaintiff shall be the sole trustee of all *wakaf* whether *wakaf am* or *wakaf khas*, of all *nazr am*; and all trust of every description creating any charitable trust for the support and promotion of the religion of Islam or for the benefit of Muslims in accordance with *hukum syarak*, to the extent of any property affected by the *wakaf, nazr am*, or trust and situated in the State of Penang. The land is in my view a *wakaf* property by reason of the express dedication of the late Hj Driss and his wife as contained in the deed poll and the indenture hence calling for the invocation of ss 89 and 90 of the Enactment.

[64] Section 90 of the Enactment provides that all property subject to s 89 shall without any conveyance, assignment or transfer, and, in the case of immovable property, upon registration under the written law relating to land, vest in the Majlis, for the purpose of the *wakaf, nazr am* or trust affecting the property. In reading ss 89 and 90 together and applying the said provisions to the facts of the present case before me, it clearly means that the land vests in the plaintiff even in the absence of any conveyance, assignment or transfer whatsoever, for the purpose of the *wakaf* affecting the said land. I find authority in support in the case of *Seberang Baru Sdn Bhd v Majlis Ugama Islam Pulau Pinang dan Seberang Perai* [2011] MLJU 1553; [2011] 1 LNS 1768 as follows:

> ... there was never any waiver by the respondent, in relation to its interest in the said lands or whatever. The entry of the private caveat was an assertion of the respondent's interest. Although by the Registrar, the entry of the registrar's caveat was nonetheless an assertion that the title of the appellant was challenged.
>
> On the alleged delay by the respondent to lodge its interest, it should be appreciated that *wakaf* properties in the State could not have been identified when the respondent became its sole trustee on 1 January 1967. The NLC and the P&M had just come into force. Until 1966, when the NLC and P&M came into force, conveyances would have been under the deeds system. The search of deeds, to identify all *wakaf* in the State, which could only be done manually, would take a long time. Meantime, as sole trustee, the respondent had to take possession of all *wakaf*, to protect and or preserve all *wakaf* from whatever, when even if the *wakaf* or

all *wakaf* had as yet not been identified. *Section 90(1) and (2) of the Enactment provided the solution to the problem, with a blanket vesting of all wakaf in the State, without the respondent having to take the steps to vest in itself the wakaf. Vesting, with endorsement on the title, was not required by the Enactment, and the appellant could not be heard to say that the respondent had not done so.*

There was no negligence on the part of the respondent. If at all, the respondent was vigilant to stop an improper dealing. Whatever alleged loss that the appellant suffered was clearly only on account of its own imprudence. Simply put, there was no case for the appellant to lay its alleged loss at the door of the respondent. (Emphasis added.)

[65] In accord with the above authority, I share the same view that it would be unreasonable to require the plaintiff to assume the arduous task of tracking and identifying each and every one *wakaf* in the state done under the deed system prior to year 1966 which could only be done manually. As such provision under s 90 of the Enactment provides for the convenience of a blanket vesting of all *wakaf* in the state in the plaintiff without the need for the plaintiff to lodge its interest in the said land.

[66] The plaintiff had in this case denied knowledge of the existence of *wakaf* prior to April 2014 and had upon discovery of the *wakaf* status of the land had in the same month entered caveat on the said land and had acted promptly by filing this action, 2 1/2 months after discovery, to assert its right on the land. On a balance of probabilities and in the absence of any evidence to attribute knowledge on the plaintiff of the *wakaf* prior to 2014, and in view of ss 89 and 90 of the Enactment; I am of the view that the plaintiff's cause of action, for the purpose of calculation of limitation, should begin with the date of discovery ie April 2014 and this action is therefore not barred by limitation but was in fact filed within time.

VALIDITY OF THE SALE AND PURCHASE AGREEMENT AND OTHER RELEVANT DOCUMENTS RELATED TO THE LAND

[67] The plaintiff had in its claim against the defendants pleaded fraud, misrepresentation, falsification, insufficient or void instrument or negligence by the defendants in entering into the sale and purchase agreement with regard to the land. On this account, the plaintiff thereby claimed that the sale and purchase agreement and other related documents thereto ineffective, invalid and void.

[68] The plaintiff submitted that it has a right over the land arising from the *wakaf* and such right was conferred upon the plaintiff by the Enactment. The plaintiff went on to submit that despite its right over the land, the defendants had nevertheless entered into a sale and purchase agreement with regard to the

land and the first defendant had granted the power of attorney over the said land to the second defendant.

[69] The plaintiff further submits that the defendants had knowledge or means of knowledge with regard to the plaintiff's right over the land and it is on this account that the plaintiff claimed the defendants as party or privy to the fraud, misrepresentation, falsification, insufficient or void instrument, or negligence as alleged.

[70] The first defendant in its defence against the plaintiff's claim denied knowledge of the *wakaf* status of the land and that there was no indication on the land search conducted which requires the defendant to make further and other searches on the land.

[71] On the allegation of fraud, the principle governing the applicable standard of proof on fraud in civil cases is set straight in the Federal Court case of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584 where it was held, per Richard Malanjum CJ (Sabah and Sarawak), delivering the judgment of the court:

> The correct principle to apply is ... where it was stipulated that at law, there are only two standards of proof, namely beyond reasonable doubt for criminal cases and on the balance of probabilities for civil cases. As such, *even if fraud is the subject in a civil claim, the standard of proof is on the balance of probabilities*. There is no third standard. Therefore, it is up to the presiding judge, after hearing and considering the evidence adduced as being done in any other civil claim, to find whether the standard of proof was attained. The criminal aspect of the allegation of fraud and the standard of proof required is irrelevant in the deliberation. (Emphasis added.)

[72] Turning to the evidence elicited before me, I find no evidence adduced before this court to show that the defendant had actual knowledge of the existence of the deed poll and the indenture both of which were created all the way back in 1882 and 1905 respectively of which the first defendant was not a party or privy to. It is not incumbent upon the defendants to find out what was not reasonable for the defendants to find out. I am therefore of the considered view that the plaintiff had failed to satisfy this court, on the balance of probability its allegation of fraud against the defendants.

[73] However, having ruled that the land is a *wakaf* land based on the interpretation of the deed poll and the indenture supported by the *fatwa* ruling; having also read ss 89 and 90 of the Enactment concerning automatic vesting of *wakaf* property on the plaintiff, the ex parte order dated 9 April 2013 is therefore null and void hence must be set aside.

INDEFEASIBILITY OF TITLE

[74] It is the first defendant's contention that he, as the administrator of the estate of the deceased has an indefeasible title to the said land as provided under s 340(1) of the NLC and that second defendant being a bona fide purchaser for value of the said land is therefore protected by the proviso as contained under s 340(3) of the NLC. The relevant excerpt of s 340 of the NLC reads as follows:

> 340 Registration to confer indefeasible title or interest, except in certain circumstances.
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible —
>
> (a) In any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) Where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) Where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> Where the title or interest of any person or body is defensible by reason of any of the circumstances specified in sub-section (2) —
>
> (a) It shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) Any interest subsequently granted there out shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> (c) Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

[75] The second defendant had further advanced the argument that pursuant to the National Land Code (Penang and Malacca Titles) Act 1963 ('Act 518'), the land had become indefeasible under the NLC from 1 January 1985 with Hj Mahomed bin Hj Abdul Rasheed being the owner absolutely.

[76] It must however be noted that with regard to *wakaf* matter, s 4(2)(e) of the NLC explicitly provide that the NLC does not extend to *wakaf* land. Justice Wong Teck Meng in the first defendant's striking out application had referred to the case of *Majlis Agama Pulau Pinang & Seberang Perai v Katijah*

Yoan & Ors [2009] MLJU 1868; [2010] 4 CLJ 592 and decided as follows:

> I agree with the submission of the plaintiff that by virtue of s 4(2)(e) of the National Land Code, the first defendant cannot rely on s 340 of the NLC to allege indefeasibility of title in respect of the registered or beneficial ownership of the said land. See *Majlis Agama Islam Pulau Pinang & Seberang Perai v Katijah Yoan & Ors* [2009] MLJU 1868; [2010] 4 CLJ 592 where it held that the indefeasibility of title protection accorded by the proviso to s 340(3)(b) of the National Land Code did not apply to *wakaf* land.

[77] The plaintiff had also referred to the Court of Appeal case of *Seberang Baru Sdn Bhd v Majlis Ugama Islam Pulau Pinang dan Seberang Perai* [2011] MLJU 1553; [2011] 1 LNS 1768, a case with rather similar facts to the present case of which I found very much guidance. Court of Appeal had on the issue of an ex parte order made which had traversed s 89 of the Enactment held as follows:

> The *ex parte court order approving sale of the said lands to the appellant was obtained in defiance of the provisions of ss 89(2) and 90 of the Enactment*. The appellant could not hide behind that ex parte order approving sale, which could not, surely not, have been granted, had the respondent been before the court that granted the ex parte order. *By operation of law, the respondent was the sole trustee of the said lands at the material time, and the ex parte court order approving sale, which was applied by and granted to Mohd Atan bin Mohamed who had no legal capacity to bind the said lands, was no answer*.
>
> ... The appellant should not have been in the dark about the *wakaf* condition of the said lands. The said trust deed was registered in the Registry of Deeds of the Settlement of Penang. That valid and effectual trust deed was still in the possession of the land office on the very day that the assistant land administrator (PW3) testified that a search would have unearthed that trust deed ... But *no order of court could override a statute. So, when that ex parte order approving the sale was found wanting, the appellant lost even a straw to clutch on to*.

[78] Court of Appeal, in the said case, went on further to determine on the issue of indefeasibility of title with reference to the landmark case of *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1 and held as follows:

> The indefeasibility of title and exceptions under s 340(3)(a) and (b) of the NLC were reconsidered by the Federal Court in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269, where the facts were that a piece of land was charged by the purported attorney of the registered owner. The trial court found that the registered owner had never granted the alleged power of attorney but held that it was bound to follow the decision of the Federal Court in *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241; [2001] 2 CLJ 133, where it was held, inter alia, that by virtue of the proviso to s 340(3) of the NLC, any purchaser in good faith for valuable consideration enjoyed immediate indefeasible title, which meant that despite a finding that registration of the interest was obtained by fraud or forgery, an indefeasible title nonetheless passed. The

Federal Court (Zaki Azmi Chief Justice, Alauddin PCA, Ariffin Zakaria CJ (Malaya), Zulkefli and James Foong FCJJ) in *Tan Ying Hong v Tan Sian San & Ors* totally disagreed with *Adorna*. In the latter case, the Federal Court held that *s 340(1) of the NLC confers an immediate indefeasible title or interest in land upon registration, subject however to the exceptions set out in s 340(2) and (3), that the immediate transferee of any interest in land cannot take advantage of the proviso to s 340(3) of the NLC, and that the title of an immediate transferee is liable to be set aside*. The Federal Court effectively restored the position that only the title of a purchaser in due course, for value and without notice, is indefeasible. *Tan Ying Hong* is now the authority to follow on the law relating to the indefeasibility of title under s 340 of the NLC.

...

In the instant case, the title of the appellant was not derived from the respondent, who as the trustee vested with the said lands, was the only legal person or body who could pass legal title to the appellant. *The title of the appellant was derived from a void instrument, and was therefore defensible under s 340(2)(b) of the NLC. But as an immediate transferee, the appellant could not take advantage of the proviso to s 340(3) of the NLC.* Given so, it was entirely futile to contend that the appellant had no notice of the interest of the respondent, be it from whatever search of the interim register or from whatever else, and or that the respondent had not given notice of its interest and had done nothing to register its interest. Rather to the contrary, the respondent was not required to take steps to vest in itself lands situated in the State of Penang. Pursuant to s 90(2) of the Enactment (which also came into force on 1 January 1967) the respondent was required to take necessary steps to vest its interest only if the land was situated outside the State of Penang.

The fact of the matter was that 'bona fide purchaser without notice' was not available to the appellant. So, even if it were true that the appellant had no notice of the interest of the respondent, it would not change the result. To put it in its proper perspective, *the appellant was an immediate transferee. If it could be shown that the transferor from whom the appellant derived title had no capacity to pass title to the appellant, then the title of the appellant was liable to be set aside*. On the facts of the case, that was all that mattered. It was the finding of the court below, that that transferor had no capacity to pass title to the appellant, and that the registration of the title of the appellant was obtained by the means of a void instrument. With that finding, the court below was more than warranted to set aside the title of the appellant under s 340(2)(b) of the NLC, without the need to consider or to resort to s 4 of the NLC.

[79] Having ruled as I did above with regard to the *wakaf* status of the said Land, there should be no dispute that s 4(2)(e) of the NLC is applicable to the facts and circumstances of the case. With that being said, I concur with the decision reached by Justice Wong Teck Meng that the defendants cannot therefore rely on s 340 of the NLC and/or Act 518 where *wakaf* land is concerned; such provisions must be read subject to s 4(2) of the NLC. By the operation of ss 89 and 90 of the Enactment, the title to the land is automatically vested on the plaintiff, as such any order granting title of the said

land to any other party other than the plaintiff is invalid, null and void and shall therefore be set aside.

[80] Notwithstanding the applicability of s 4(2)(e) of the NLC in this present case, whether or not the second defendant is a bona fide purchaser for value is of no significance as the first defendant was not in the legal capacity to sell the land to the second defendant in the first place. Any rights or interest acquired by the second defendant with regard to the said land was obtained by means of a void instrument and is therefore defensible under s 340(2)(b) of the NLC, the proviso to s 340(3) of the NLC is not in this instance available to the neither defendants.

CONCLUSION

[81] In coming to a decision, this court has carefully weighed both the oral and documentary evidence adduced by all parties, scrutinised all the documents tendered and relied upon by the parties and considered the written submissions as well as the authorities filed by them. In considering the evidence as a whole especially the evidence of all the plaintiff's witnesses vis a vis the pleadings, and that of the defendants, it is my considered view that the plaintiff had proved its pleaded case on a balance of probabilities against the defendants. But no damages as no evidence had been led to prove any damage.

[82] For the reasons adumbrated above and in considering the totality of evidence before me, I hereby allowed the plaintiff's claim and order as follows:

(a) that the said land be vested in the plaintiff and the plaintiff's name be registered as the proprietor of the said land;

(b) that the transfer of ownership of the said land registered on 12 April 2013 under Presentation No 0705B2013000423 from the name of the deceased to the first defendant according to the grant of administration is invalid, void and be set aside;

(c) that the order dated 9 April 2013 in the proceeding of the originating summons be cancelled and/or set aside;

(d) that the sale and purchase agreement entered into between the first defendant and the second defendant involving the sale and purchase of the said land be set aside and/or cancelled;

(e) that the power of attorney granted by the first defendant to the second defendant be set aside and/or cancelled;

(f) that the entry of private caveat dated 12 April 2013 by the second defendant onto the said land be cancelled and removed, expenses incurred to be borne by second defendant;

(g) for the name of the first defendant (or name of the second defendant) to be removed from the document of title of the said land and be replaced with the name of the plaintiff, expenses incurred therein to be borne by the plaintiff;

(h) that any transfer in respect of the said land made between the first defendant and the second defendant (if any) be cancelled and set aside; and

(i) that the registrar of land title or the land administrator concerned shall make and execute all necessary actions and measures to give full effect to all the orders given herein.

[83] On the counterclaim by the first defendant, with the findings of this court as above, I hereby dismissed the first defendant counterclaim. Costs of this action of RM10,000 to be paid by the defendants to the plaintiff.

Order accordingly.

Reported by Ashok Kumar